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IN THE
COURT OF APPEALS OF INDIANA

MILTON RUTAN and KATHLEEN RUTAN, Appellants-Defendants, vs. SKYLER MIZE-EMLEY and TIFFANY EMLEY, minors, b/n/f ALISHA EMLEY and BILLY EMLEY, Appellees-Plaintiffs, and JAY ELMORE, Appellee-Defendant.	)	No. 36A04-0604-CV-187

INTERLOCUTORY APPEAL FROM THE JACKSON SUPERIOR COURT

The Honorable Bruce Markel, III, Judge
Cause No. 36D01-0307-CT-21

February 15, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Defendants-Landlords Milton Rutan and Kathleen Rutan ("the Rutans") bring this interlocutory appeal challenging the denial of their summary judgment motion and the grant of Previous Property Owner-Defendant Jay Elmore's summary judgment motion against Plaintiffs-Tenants Skyler Mize-Emley and Tiffany Emley, by next friends Billy and Alisha Emley (collectively, "the Emleys"). The Emleys cross-appeal the grant of Elmore's summary judgment motion. Because the Emleys have failed to establish a genuine issue of material fact as to whether the Rutans owed a duty to them, we reverse the trial court's denial of the Rutans' motion for summary judgment. Likewise, because the Rutans and the Emleys have failed to establish a genuine issue of material fact as to whether Elmore owed a duty to the Emleys, we affirm the trial court's grant of Elmore's motion for summary judgment. Reversed in part and affirmed in part.

Facts and Procedural History

The undisputed facts are as follows.[1] On October 28, 1992, the Rutans purchased a Seymour residence ("the Premises") from Elmore. Elmore had not built the home, but he

[1] The Emleys adopted the Rutans' Statement of the Facts. *See* Emleys' Br. p. 1.

had bought the Premises from a previous owner three years earlier. During his ownership of the Premises, Elmore painted the exterior of the home. When he sold the Premises to the Rutans, Elmore did not make any representations to them regarding the existence of lead-based paint or residue at the Premises. After selling the Premises, Elmore had no control over and made no changes to the Premises.

After purchasing the Premises, the Rutans performed routine maintenance such as replacing the roof, changing the heating system, replacing the exterior siding, and replacing the windows. The Rutans also painted the interior of the Premises with latex paint.

In March 2002, the Emleys leased the Premises from the Rutans, and in so doing they examined and accepted the Premises and fixtures contained therein. Appellants' App. p. 160. The Emleys moved in and accepted complete possession and control over the Premises, including maintenance. *Id*. The Rutans did not make any representations as to the presence of lead-based paint at the Premises or whether they would remove lead particles from the Premises if discovered.

In September 2002, following an inspection of the Premises, the Indiana State Department of Health reported that the Premises had elevated levels of lead in the exterior paint, exterior soil, and interior dust. Both the Rutans and Elmore claim that they were unaware that elevated levels of lead were present at the Premises until the contents of this report were disclosed to them.

On July 29, 2003, the Emleys filed a complaint against the Rutans alleging that the Rutans had been negligent in failing to maintain the Premises in a safe condition and in failing to warn the Emleys of the presence of lead at the Premises and that the Emleys

suffered permanent injuries as a result of such negligence. On January 26, 2005, the Emleys filed their second amended complaint adding Elmore as a defendant.

On September 1, 2005, the Rutans filed a motion for summary judgment, arguing that they owed no duty to the Emleys. On December 16, 2005, Elmore filed a motion for summary judgment, arguing that he owed no duty to the Emleys. Following a hearing, on February 8, 2006, the trial court denied the Rutans' motion for summary judgment and granted Elmore's motion for summary judgment. The Rutans now bring this interlocutory appeal.

Discussion and Decision

On appeal, the Rutans raise three issues, which we consolidate and restate as follows: (1) whether the trial court erred in denying their summary judgment motion and (2) whether the trial court erred in granting Elmore's summary judgment motion. The Emleys join the Rutans as to the latter issue. Our standard of review is well settled:

> Summary judgment is appropriate when the designated evidentiary matter reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that there is an entitlement to judgment as a matter of law. If the moving party meets these requirements, the burden then shifts to the nonmovant to establish genuine issues of material fact for trial.
>
> In reviewing the grant or denial of a motion for summary judgment, we are bound by the same standard as the trial court. We consider only those facts which were designated to the trial court at the summary judgment stage. We do not reweigh the evidence, but rather, liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. Even if the facts are undisputed, summary judgment is inappropriate where the record reveals an incorrect application of the law to the facts. Summary judgment is rarely appropriate in negligence cases because issues of contributory fault, causation, and reasonable care are more appropriately left for determination by the trier

of fact.

Zubrenic v. Dunes Valley Mobile Home Park, Inc., 797 N.E.2d 802, 804-05 (Ind. Ct. App. 2003) (citations omitted), *trans. denied*.

The action brought by the Emleys against the Rutans and Elmore sounds in negligence. To recover under a theory of negligence, a party must establish: (1) a duty on the part of the defendant owed to the plaintiff; (2) a breach of that duty; and (3) an injury to the plaintiff proximately caused by the breach. *Id.* at 805. Ordinarily, summary judgment is inappropriate in negligence cases. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 783 (Ind. 2004), *reh'g denied*. Issues of duty, however, are questions of law for the court and may be appropriate for disposition by summary judgment. *Id*.

I. Denial of the Rutans' Summary Judgment Motion

The Rutans contend that the trial court erred in denying their motion for summary judgment because the Emleys failed to designate evidence demonstrating that the Rutans owed a duty to the Emleys.[2] The law as to the duty a landlord owes to a tenant is well established.[3] *Zubrenic*, 797 N.E.2d at 806. Generally, the common law does not impose a duty upon a landlord to protect tenants from injuries due to defective conditions on the

[2] The Rutans also argue that the Emleys' claims are precluded by the lease agreement. However, they did not raise the issue before the trial court. Issues not raised before the trial court cannot be argued for the first time on appeal and are waived. *Poulard v. Lauth*, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003). Therefore, the Rutans have waived this issue.

[3] In areas of negligence in which the question of duty has not been established, we use the three-part balancing test articulated in *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991), *reh'g denied*, to determine whether a duty exists. *N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003). The three factors to be balanced are: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. *Webb*, 575 N.E.2d at 995.

property once possession and control of the property has been surrendered. *Id.*; *see also Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind. Ct. App. 1993). This policy is known as "*caveat lessee*" or "let the lessee beware." *Dickison*, 611 N.E.2d at 694. Thus, a tenant who has the opportunity to inspect the property before accepting it is considered to have accepted the property in its existing condition. *Id*. Here, the Rutans claim, and the Emleys do not dispute, that the Rutans surrendered full control and possession of the Premises to the Emleys. However, there are several exceptions to the general rule, and the Emleys contend that two of them apply here.[4]

One such exception is a landlord's assumption of a duty on behalf of a tenant. "A duty may be imposed upon one, who, by affirmative conduct or agreement assumes to act, even gratuitously, for another." *Vertucci v. NHP Mgmt. Co.*, 701 N.E.2d 604, 607 (Ind. Ct. App. 1998). This Court has applied this exception in limited situations. We have held that the law may impose a duty upon a landlord who assumes to act for the safety of a tenant. *Vandenbosch v. Daily*, 785 N.E.2d 666, 669 (Ind. Ct. App. 2003), *trans. denied*. Additionally, liability to protect a tenant from criminal activity may be imposed upon a landlord who voluntarily undertakes to provide security measures but does so negligently. *Vertucci*, 701 N.E.2d at 607; *Nalls v. Blank*, 571 N.E.2d 1321, 1323 (Ind. Ct. App. 1991). Whether a party has assumed a duty and the extent of that duty are ordinarily questions for

[4] To support their arguments, the Emleys attempt to incorporate by reference their plaintiffs' brief in opposition to defendants' motion for summary judgment. Emleys' Br. p. 3. We decline to consider the argument in the brief the Emleys tendered to the trial court. Indiana Appellate Rule 46(B)(2) provides that argument contained in an appellee's brief "shall address the contentions raised in the appellant's argument." Therefore, we will consider only the argument contained in the Emleys' appellate brief. *See Oxley v. Lenn*, 819 N.E.2d 851, 855 n.2 (Ind. Ct. App. 2004) (refusing to consider the argument section of the summary judgment brief submitted to the trial court).

the trier of fact. *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133, 1144 (Ind. 2006), *reh'g denied*; *Vertucci*, 701 N.E.2d at 607.

Citing *Vandenbosch*, the Emleys argue that the actions of a landlord to maintain a property may create a duty on the part of the landlord to the tenant.[5] In that case, Vandenbosch, the tenant, was severely injured when he slid out of a second-story window headfirst during an apartment fire. Vandenbosch brought a negligence action against his landlords, the Dailys. The undisputed evidence showed that the Dailys, in order to pass inspection and receive approval for assistance from the United States Department of Housing and Urban development ("HUD"), were required to install a portable fire escape ladder to use as an alternate means of egress in the event of an emergency. *Vandenbosch*, 785 N.E.2d at 669. We noted that the Dailys could have chosen not to supply the ladder and therefore not get HUD assistance for that property. *Id*. However, we held that by choosing to supply a portable ladder, the Dailys assumed a duty to supply the ladder in a safe, operating condition. *Id*.

Vertucci is similar to *Vandenbosch*. In *Vertucci*, the tenant rented an apartment in an apartment complex with common areas including a swimming pool. The tenant's fifteen-year-old daughter was sexually assaulted at the swimming pool by a non-resident of the complex. Prior to renting the apartment, the tenant inquired about security, and the landlord assured him that there was security at the complex and that all tenants were issued

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[5] The Emleys assert that the Rutans performed "inspections" of the Premises, citing the Rutans' memorandum in support of their motion for summary judgment. Emleys' Br. p. 5. The record does not support the Emleys' assertion. Appellants' App. p. 14.

identification cards that they were required to carry while in the common areas. We held that there was a genuine issue of material fact as to whether the landlord assumed a duty to protect its tenants from the actions of non-residents. *Vertucci*, 701 N.E.2d at 608.

We think *Vandenbosch* and *Vertucci* are distinguishable from the case at bar. Here, the Rutans merely performed routine maintenance on the Premises before leasing it to the Emleys. They did not take any affirmative action that could be construed as an effort to protect the Emleys from the presence of lead or even to generally enhance the safety of the Premises. Thus, the routine maintenance carried out by the Rutans is simply not analogous to the Dailys' installation of a portable safety ladder, the express purpose of which was to bring the Dailys' property in compliance with specific safety requirements. Further, unlike the landlord in *Vertucci*, the Rutans did not make any assurances to the Emleys that the Premises were free of lead or employ an ongoing system to protect the Emleys from danger. Consequently, we conclude that the routine maintenance conducted by the Rutans does not establish a genuine issue of material fact as to whether the Rutans assumed a duty to the Emleys. In reaching this conclusion, we emphasize that the undisputed evidence shows that while the Rutans painted the interior of the home, elevated levels of lead were not found in the interior paint, but rather in the exterior paint, exterior soil, and interior dust.[6]

Another exception to the *caveat lessee* rule upon which the Emleys rely is that a landlord may be held liable for injuries caused by latent defects of which the landlord was aware but which were unknown to the tenant and were not disclosed by the landlord. *Hodge*

[6] We also note that there is no allegation that the Rutans' maintenance was performed in a negligent manner.

v. Nor-Cen, Inc., 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988), *reh'g denied, trans. denied*.[7] Actual knowledge of the hidden defect on the landlord's part must exist before a duty to warn of the defect arises. *Dickison*, 611 N.E.2d at 695. It is not enough that the landlord should have known of the hidden defect. *Id.* Ordinarily, actual knowledge is a question for the trier of fact. *Id.*

The Emleys assert that because the Rutans admit that they performed maintenance on the Premises, including painting the interior, there exists a genuine issue of material fact as to their actual knowledge that lead was present at the Premises. We think a comparison with *Dickison* is helpful to the resolution of this issue. In that case, Dickison fell off his friend's balcony when he fell against the railing and it failed. After finding that Dickison had presented sufficient evidence to establish that the railing was rotten but that the defect was hidden and not the type a tenant might reasonably be expected to discover, we discussed whether the evidence was such that a jury could have reasonably found that the landlord possessed actual knowledge. The evidence indicated that the landlord had twice inspected the residence; the landlord acknowledged that he possessed a trained eye in matters of the condition of wood; and the landlord collected the debris remaining from the broken railing but failed to produce it after being requested to do so by Dickison. We noted, "The failure to

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[7] There are other exceptions to the general rule that are not in issue here. A tenant may recover for injuries stemming from defective premises if the landlord expressly agrees to repair the defect and is negligent in doing so. *Houin v. Burger by Burger*, 590 N.E.2d 593, 597 (Ind. Ct. App. 1992). A landlord also has a duty to maintain in safe condition the parts of the building used in common by the tenants and over which the landlord retains control. *Hodge*, 527 N.E.2d at 1160. Finally, a landlord may be liable to a tenant because of negligence that arises from the violation of a duty imposed by statute or ordinance. *Id.*

produce available evidence raises an inference that the evidence would have been unfavorable had it been produced." *Id*. at 696. We therefore held that based on Dickison's designated evidence and the reasonable inferences to be drawn therefrom, a jury could have reasonably found that the landlord possessed actual knowledge of the hidden defect. *Id*.

Here, in contrast, the fact that the Rutans conducted maintenance on the Premises, standing alone, does not give rise to a reasonable inference that the Rutans had actual knowledge that lead was present.[8] Consequently, we conclude that the Rutans' maintenance of the Premises does not establish a genuine issue of material fact as to whether the Rutans had actual knowledge that lead was present.

In sum, the Emleys have failed to establish the existence of a genuine issue of material fact as to whether the Rutans owed them a duty. We therefore reverse the denial of the Rutans' summary judgment motion.

II. Grant of Elmore's Summary Judgment

The Rutans contend that the trial court erred in granting Elmore's summary judgment motion, and the Emleys adopt and incorporate the Rutans' argument in support thereof. As an initial matter, we note that the cases upon which both parties rely focus on complaints based on fraud and/or breach of an express or implied warranty of habitability. Such actions sound in contract. *See Reum v. Mercer*, 817 N.E.2d 1267, 1272 (Ind. Ct. App. 2004)

[8] In their brief, the Emleys point out that in a recent decision, another panel of this Court suggested that a question exists as to whether the latent/patent distinction should be made when discussing a landlord's knowledge of a defect and whether a tenant was aware of it. *See Zubrenic*, 797 N.E.2d at 806 n.2 (citing *McGlothlin v. M & U Trucking, Inc.*, 688 N.E.2d 1243, 1245 (Ind. 1997) ("To the extent that the latent/patent distinction may have been employed in earlier cases as the basis for deciding the existence of a legal duty to inspect, we find it unsatisfactory."), *reh'g denied*). However, we find this distinction to be inapplicable here because the Emleys do not argue that the Rutans had a duty to inspect the paint at the Premises.

(concluding that there was no evidence and no reasonable inferences to be drawn from the evidence that former owner of property had actual knowledge of an existing defect in the septic system at the time she completed the required disclosure form as required to impose liability on vendor for costs incurred by purchaser for repair of septic system); *see also Vetor v. Shockey*, 414 N.E.2d 575 (Ind. Ct. App. 1980) (concluding that implied warranty of habitability applicable in sale of new homes by builders-vendors would not be extended to require nonbuilder-vendor of used home to pay for cost of repairs to the septic tank).

Here, the Emleys are not suing for repair of a defect, but rather for personal injuries. In fact, the warranty of habitability implied in a lease of a dwelling does not give rise to a cause of action for personal injuries. *Schuman v. Kobets*, 760 N.E.2d 682, 687 (Ind. Ct. App. 2002), *trans. denied*. "'[I]n the adjudication of a lawsuit for relief from personal injury, the concepts of tort and negligence law provide the more straightforward way to describe the respective duties and liabilities of the parties.'" *Id*. (quoting *Favreau v. Miller*, 591 A.2d 68, 73 (Vt. 1991). We observe that none of the parties in the instant case explain the manner in which these contract cases impact the application of tort and negligence law. In addition, Elmore cites to Indiana Code §§ 32-21-5-4 and -11, which relate to the requirement that an owner provide a disclosure statement to a prospective buyer, but he declines to explain the effect of these statutes on the tort liability of a previous owner to the lessees of a subsequent purchaser. Our own research has failed to uncover an Indiana case where a tenant has brought a negligence action for personal injuries against the person who sold the property to his or her landlord.

Thus, we are presented with a case in which the question of duty has not been

established. In such situations, we balance the factors set forth in *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991), *reh'g denied*, to determine whether a duty exists: (1) the relationship between the parties; (2) the reasonable foreseeability of the harm to the person injured; and (3) public policy concerns. *See N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003). We begin by looking at the relationship between the Emleys and Elmore. Elmore did not own the Premises at the time the Emleys lived there. In fact, Elmore sold the Premises to the Rutans in 1992, a whole decade before the inspection revealed the presence of lead. The Rutans, in turn, leased the Premises to the Emleys. That is, Elmore is merely a previous owner of the Premises and does not have a close relationship to the Emleys.

We now turn to the reasonable foreseeability of harm to the person injured. The foreseeability component of duty requires a general analysis of the broad type of plaintiff and harm involved without regard to the facts of the actual occurrence. *Housing Auth. of City of South Bend v. Grady*, 815 N.E.2d 151, 159 (Ind. Ct. App. 2004). Here, it is not reasonably foreseeable that the tenants of the current owners of the property would be injured by the presence of lead paint of which the previous owner of the property was not even aware.[9]

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[9] In support of their argument that Elmore knew or had reason to know that lead was present at the Premises, the Rutans rely on the affidavit of their son, Troy Rutan, which they designated as evidence in support of their response to Elmore's summary judgment motion. However, the parties dispute whether the affidavit is admissible. At the summary judgment hearing, Elmore moved to strike the affidavit in its entirety. Although the trial court made no ruling on Elmore's motion to strike, the Rutans agreed at the hearing that certain paragraphs of the affidavit were inadmissible. Accordingly, we ignore those paragraphs that the Rutans agreed should be stricken. We consider the remainder of the affidavit admissible.

Troy Rutan's affidavit contains the following relevant testimony:

> 5. Jay Elmore applied the unusual-colored paint to the exterior of the house in approximately 1990 or 1991.
>
> . . . .
>
> 10. Further, after I learned that the [Emleys] were making complaints about lead exposure from their house, I obtained a home test kit for lead. I tested the unusual-colored

The final factor in determining whether a duty exists is public policy concerns. Here, public policy weighs against imposing a duty on a previous owner of a property to tenants of the current owners of that property. With regard to leased residences in particular, even the landlord is not held responsible for injuries to tenants. *Id.* at 159-60. "Generally, the common law does not impose a duty upon a landlord to protect tenants from injuries due to defective conditions on the property once possession and control of the property has been surrendered." *Zubrenic*, 797 N.E.2d at 806. Here, Elmore is not the landlord; the Rutans are the landlords. Therefore, it does not follow that a previous owner of a property should owe a duty to the tenants of the current owners of that property.

Upon balancing the three factors articulated in *Webb*, we conclude that Elmore's non-existent relationship with the Emleys, any foreseeability of the harm at issue, and the public policy considerations against imposing a duty against a previous owner of a property who has no knowledge of a defect in that property weigh against imposing a duty. Thus, we must conclude that Elmore did not owe a duty of care to the Emleys. We therefore affirm the trial court's grant of summary judgment in favor of Elmore.

Reversed in part and affirmed in part.

BAKER, J., concurs.

CRONE, J., concurs in result as to Issue I and dissents as to Issue II with separate opinion.

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paint with the kit and found it to contain high levels of lead.

IN THE
COURT OF APPEALS OF INDIANA

Appellants' App. p. 143-44.

MILTON RUTAN and KATHLEEN RUTAN,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 36A04-0604-CV-187
	)	
SKYLER MIZE-EMLEY and	)	
TIFFANY EMLEY, minors,	)	
b/n/f ALISHA EMLEY and BILLY EMLEY,	)	
	)	
Appellees-Plaintiffs,	)	
	)	
and	)	
	)	
JAY ELMORE,	)	
	)	
Appellee-Defendant.	)	

CRONE, Judge, concurring in result as to Issue I and dissenting as to Issue II

I concur in result as to Issue I because I agree that the Emleys have failed to establish the existence of a genuine issue of material fact as to whether the Rutans owed them a duty. However, I write separately to address the utility of the latent/patent distinction embodied in the principle that the majority applies, namely, that a "landlord may be held liable for injuries caused by *latent* defects of which the landlord was aware but which were unknown to the tenant and were not disclosed by the landlord." Slip. op. at 9 (emphasis added).

In *Zubrenic*, another panel of this Court acknowledged that our contemporary understanding of duty creates doubt as to the soundness of the latent/patent distinction. The *Zubrenic* court noted,

> The question exists as to whether the latent/patent distinction should be made when discussing the landlord's knowledge of a defect and whether the tenant was aware of it. In *McGlothlin v. M & U Trucking, Inc.*, 688 N.E.2d 1243, 1245 (Ind. 1997), our Supreme Court, in discussing the duty present

> when one supplies a defective chattel, acknowledged that the determination of a duty based upon a supplier's knowledge of potential defects is inconsistent with the broader evaluation as to duty which is now required. The Court concluded that it is unsatisfactory to employ the latent/patent distinction when deciding the existence of a legal duty to inspect. *Id*. While we do not address whether the latent/patent distinction continues to exist when discussing landlord-tenant law, we do note that the distinction may no longer be valid under the current view of the existence of a duty.

797 N.E.2d at 806 n.2.

In *McGlothlin*, our supreme court concluded that the latent/patent distinction had lost its utility and held that the legal duty owed by a supplier of the chattel should not rest upon whether the defect is considered latent rather than patent, thereby overruling *Evansville American Legion Home Association v. White*, 239 Ind. 138, 141, 154 N.E.2d 109, 111 (1958). 688 N.E.2d at 1245. The supreme court explained,

> During the [thirty]-nine years that have elapsed since *White*, especially in recent years, this Court has discussed the role of duty as one of the elements of the tort of negligence and explored the factors courts use in determining whether a duty exists in a particular case, noting as significant among these considerations the relationship of the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns. The conclusion in *White*, which narrowly determined duty based upon a supplier's knowledge of potential defects, is inconsistent with the broader evaluation as to duty that we now require.

Id. (citations omitted). In abandoning the latent/patent distinction, the supreme court found that the relevant sections of the Restatement (Second) of Torts (1965) ("the Restatement") more accurately reflected our present-day view of duty. The supreme court adopted Section 388, applicable to all suppliers of chattel known to be dangerous for its intended use,[10] and

[10] Section 388 of the Restatement, which is particularly germane to this discussion because of its parallel language, provides,

Section 392, applicable to persons supplying chattel to be used for business purposes. The supreme court concluded that "[t]he factors incorporated in each of these sections are consistent with our jurisprudence regarding the determination of whether a duty exists." *Id*. at 1245.

Although the *McGlothlin* court focused on the duty owed by a supplier of chattel, the court's rationale for abolishing the latent/patent distinction in that case is equally valid in the context of the duty owed by a landlord to a tenant. Therefore, I would abandon the patent/latent distinction in this case. Additionally, the supreme court found the Restatement to be consistent with our jurisprudence regarding the determination of whether a duty exists, and I believe the sections of the Restatement applicable to lessor liability efficiently embody our present-day understanding of duty. Accordingly, I would adopt the following sections of the Restatement.

Section 356 of the Restatement sets forth the general rule on the liability of lessors for conditions existing when a lessor transfers possession:

> Except as stated in §§ 357-362, a lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, *which existed when the lessee took possession*.

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) *knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied*, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

(Emphasis added.) Section 358 of the Restatement pertains to undisclosed dangerous conditions known to the lessor:

> (1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, *if*
>
> (a) *the lessee does not know or have reason to know of the condition* or the risk involved, *and*
>
> (b) *the lessor knows or has reason to know of the condition*, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.
>
> (2) If the lessor actively conceals the condition, the liability stated in Subsection (1) continues until the lessee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the lessee has had reasonable opportunity to discover the condition and to take such precautions.

(Emphases added.)

Applying Section 358 to the facts at hand, the issue as to the duty owed by the Rutans to the Emleys is resolved by examining whether the Rutans knew or had reason to know that there were elevated levels of lead present at the Premises. I would conclude that the fact that the Rutans performed maintenance, including painting the interior of the home with latex paint, changing the heating system, and replacing the windows, roof, and exterior siding does not support an inference that the Rutans knew or had reason to know that there were elevated amounts of lead at the Premises. I would therefore reverse the trial court's denial of the Rutans' motion for summary judgment on this ground.

As to Issue II, I must respectfully dissent from the majority's conclusion that Elmore did not owe a duty of care to the Emleys. I agree that we are presented with a question of duty that has not been established and that the *Webb* factors are applicable. As with Issue I, I

believe the Restatement encompasses these considerations and sets forth a concise statement of law. I would adopt Section 353, which provides,

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee *or his subvendee* for physical harm caused by the condition after vendee has taken possession, if
>
> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
>
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
>
> (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

(Emphasis added.) The Comment to Subsection (1) notes, "The words 'with the consent of the vendee or his subvendee' include not only those who are there by the consent of the vendee as his licensees but any person to whom he subsequently sells or leases the land and those who enter with the consent of such subvendee or lessee." RESTATEMENT (SECOND) OF TORTS § 353, cmt. a.

Applying Section 353 to the case at bar, the issue becomes whether Elmore knew or had reason to know that the Premises were contaminated with elevated levels of lead. Troy's affidavit asserts both that Elmore painted the exterior of the home and that the paint he used tested positive for lead. In addition, Elmore does not dispute that the Indiana State Department of Health found elevated levels of lead in the exterior paint. Rutans' App. at 27. The jury may examine surrounding circumstances to reasonably infer that a particular actor had knowledge or had reason to have knowledge of a defect. *Dickison*, 611 N.E.2d at 695.

This is the case even when a party denies actual knowledge. *Id.*; *see also Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 555 (Ind. 1987) (noting that where actual knowledge must be established to prevail on a claim or an affirmative defense, the function of summary judgment would be subverted if a party's denial of actual knowledge were unassailable, automatically insulating that party from liability). Accordingly, the evidence supports a reasonable inference that Elmore knew or had reason to know that the paint he used on the exterior of the Premises contained lead. I would conclude that the Emleys established a genuine issue as to whether Elmore knew or had reason to know that the Premises were contaminated with lead.

I would reach the same conclusion even if I were to follow the majority's analysis. In considering the relationship between the parties, Elmore owned the Premises and performed maintenance work on them. The Emleys lived there. Thus, both parties had intimate ties to the Premises. Those ties denote a significant relationship between the parties that cannot be negated by the existence of another owner. As to the reasonable foreseeability of the harm, if Elmore knew he painted the exterior of the home with lead paint, it is reasonably foreseeable that persons living in the Premises would be injured by the lead in the paint. Finally, public policy weighs in favor of imposing a duty on a prior owner of a residence where that owner had knowledge that he applied a lead-based paint to that residence. The use of lead-based paint was banned for residential purposes in 1978. 16 C.F.R. § 1303.1(a)(1977). Elmore painted the exterior in 1990 or 1991, after the ban was imposed. Further, the paint he used was an unusual color. I think it is unconscionable to allow a property owner the liberty to knowingly use lead-based paint on a residence and avoid liability to all but the immediate

buyer merely by selling the property. For these reasons, I would reverse the trial court's grant of summary judgment in favor of Elmore.